IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4832 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AXEL POLYMERS LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 4832 of 2004

MR MIHIR JOSHI with MS AMRITA M THAKORE for Petitioners

MS MANISHA LAVKUMAR for Respondent No. 1,2-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 21/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Ms Manisha Lavkumar, learned additional

standing counsel for the Central Government waives service of Rule for the respondents.

With the consent of the learned counsel for the parties, the petition is taken up for final disposal today.

2. The facts leading to filing of this petition are as under :-

2.1 Petitioner No.1 (hereinafter referred to as "the petitioner) is engaged in the business of manufacturing compounded LDPE, compounded HDPE and compounded Polyanmide. By show cause notice 19.8.1998, the respondent authorities called upon the petitioner to show cause why duty of Rs.9,09,724/- and penalty should not be levied on the ground that on comparison of the inputs namely LDPE and HDPE received in the factory and the quantity manufactured by the unit, there was a shortage of quantity valued at Rs.36,38,895/-. The petitioner contested the matter by filing its reply dated 25.1.1999 contending that there was no clandestine removal and that the records of the inputs fully matched with the physical stock and records of finished goods and that in any case the petitioner had already paid total amount of Rs.9,09,724/- towards the said duty liability between 13.2.1998 and 16.4.1998. The petitioner appeared at the personal hearing on 27.1.1999 and pointed out that the quantity of finished goods produced out of the specified quantity of inputs would ordinarily turn out to be less than the quantity of inputs utilized and that the allegation of removal of inputs was not supported by any documentary evidence whatsoever. However, the Deputy Commissioner of Central Excise confirmed the show cause notice by his order dated 19.2.1999 (Annexure "A") and ordered recovery of excise duty of Rs.9,09,729/- and penalty of equal amount.

2.2 The petitioner challenged the said order in appeals before the Commissioner (Appeals), Baroda and also filed stay application. By stay order No.551-552/99 dated 19.11.1999 (Annexure "B"), the Commissioner (Appeals) directed the petitioner to deposit Rs.5 lakhs as a pre-deposit under Section 35F of the Central Excise Act, 1944. On 17.12.1999 the petitioner filed an application for review of the above order on the ground that it was passed without hearing the petitioner and that the petitioner had already deposited Rs.9,09,724/even before issuance of the show cause notice. However, the said application for review was not decided and the Commissioner (Appeals) dismissed the appeals on 14.2.2000 on the ground of non-compliance with

the order of pre-deposit and directed commencement of coercive recovery.

2.3 The petitioner filed Special Civil Application No. 1350 of 2000 before this Court and contended that the appeals ought not to have been dismissed without giving the petitioner an opportunity of being heard and without first deciding the petitioners' application for review of the stay order. On 8.3.2000, this Court disposed of the said petition after giving following directions :-

> "It appears that review application dated 17.12.1999, a copy of which is produced at Annexure-D to the petition was made by the petitioner and without considering that review application and making an order thereon, other orders have been made which are prejudicial to the petitioners. It is submitted that in similar matters in past, the review applications have been entertained. It would be appropriate for the concerned authorities, therefore, to consider and decide this review application. It is, therefore, directed that the concerned authority of the respondents shall consider and decide the review application dated 17.12.1999 a copy of which is at Annexure-D to the petition, notwithstanding the fact that the concerned authorities have passed other orders in the matter. The effect of any order that may be made in the review application will be given in context of the question of entertaining the appeal. The review application will be expeditiously decided, preferably within 6 weeks from today as stated by the learned counsel for the respondents. In the mean time, it is understood that no coercive recovery will be effected."
>
> (emphasis supplied)

2.4 It appears that nothing transpired for almost three years inspite of the petitioner's requests and reminders to take up the review application for hearing, as is stated in the memo of the petition. Ultimately the Commissioner (Appeals) issued the notice for personal hearing on 23.1.2003 (Annexure "E") and fixed the personal hearing on 14.2.2003. However, the hearing did not take place on the ground that the petitioner's review application was not available in the office records of the Commissioner (Appeals) and while stating so in his communication dated 18.2.2003 (Annexure "F"), the

Commissioner (Appeals) further stated as under:-

> "The Hon'ble High Court of Gujarat, Ahmedabad vide its oral order dated 08.03.2000 (received on 28.03.2000) directed to consider and decide the review application dated 17.12.99. ... ... Moreover, it is also observed that your main appeal has already been dismissed by the Commissioner (Appeals), Central Excise & Customs, Vadodara vide Order-in-Appeal No. Commr(A)/157 & 158/VDR/2000 dated 14.2.2000 for non compliance of direction to deposit Rs.5,00,000/- under provision of Section 35F of Central Excise Act, 1944, prior to receipt of Hon'ble High Court of Gujarat, Ahmedabad's oral order dated 8.3.2000. Therefore, the question of consideration of review application dated 17.12.99 does not arise and the remedy lies in filing appeal to Hon'ble Tribunal against Order-in-Appeal dated 14.2.2000."

In view of the above communication, the petitioner alongwith its representation dated 8.7.2003 (Annexure "G") forwarded a duplicate of the review application and also submitted that the review application was required to be decided on merits in view of the direction given by this Court. The Commissioner (Appeals), however, by his impugned communication dated 27.1.2004 (Annexure "I") informed the petitioner that by his communication dated 18.2.2003 the Commissioner had already indicated his stand and that nothing further was required to be done.

2.5 Thereafter, respondent No.3-Superintendent of Central Excise and Customs, Baroda attached the petitioner's goods valued at Rs.9,90,000/and intimated that the same will be auctioned for recovering the amount of duty and penalty. That was done by letter dated 16.2.2004 (Annexure "K") and by another letter dated 27.3.2004 (Annexure "L"), respondent No.3 called upon the petitioner to pay the remaining amount of Rs.9,69,724/- by 31.3.2004 failing which the attached goods will be sold off and auctioned.

2.6 The petitioner has thereupon filed the present petition challenging the communications dated 18.2.2003 (Annexure "F") and 27.1.2004 (Annexure "I") and also the notices (Annexures "K" and "L") for coercive recovery.

3. Mr Mihir Joshi, learned counsel for the petitioner has submitted that on 8.3.2000 when this Court

issued directions to the Commissioner (Appeals) to decide the petitioner's review application "notwithstanding the fact that the concerned authorities have passed other orders in the matter" and "the effect of any order that may be made in review application will be given in context of the question of entertaining the appeal", the Commissioner (Appeals) was duty bound to hear the review application on merits and if the review application was allowed, to give consequential effect by hearing the stay application afresh on merits and thereafter to hear the appeals on merits.

4. On the other hand, Ms Manisha Lavkumar, learned additional standing counsel for the respondents has submitted that since the appeals were already dismissed by the Commissioner (Appeals) as far back as on 14.2.2000 and the said order was not set aside by this Court while disposing of the petition on 8.3.2000, no fault can be found with the stand of the Commissioner (Appeals) that he could not entertain the review application in respect of a stay order in an appeal which was already disposed of.

5. Having heard the learned counsel for the parties, we are of the view that it was only in deference to the appellate authority that this Court did not straightaway proceed to set aside the order dated 14.2.2000 (Annexure "C") passed by the Commissioner, but required the appellate authority to hear and decide the review application on merits. Thereafter, only if the review application were to be allowed, the question of restoring the appeals on his file would arise. If the review application were to be dismissed, nothing further was required to be done as the controversy would then come to an end so far as the Commissioner (Appeals) was concerned. However, this does not seem to have been appreciated by the Commissioner (Appeals) and, therefore, a hyper-technical stand has been taken by the Commissioner (Appeals). If at all such a technical stand had to be taken, it ought to have been taken at the hearing of Special Civil Application No. 1350 of 2000 in which case this Court would have issued more detailed and clearer directions and would have expressly set aside the order dated 14.2.2000 (Annexure "C"). In any case, once this Court gave the directions as contained in the aforesaid order dated 8.3.2000, the Commissioner (Appeals) was bound to comply with the said directions and if at all he had any doubt, he ought to have moved this Court with an application for review/modification/clarification.

6. In the result, this petition is allowed. In order to remove any doubt, we hereby expressly set aside the order dated 14.2.2000 (Annexure "C") in Appeal Nos. 157 and 158 of 2000 and direct the Commissioner (Appeals) to treat the said appeals as pending on his file and to hear the petitioner's review application dated 17.12.1998 on merits before taking up the above numbered appeals for hearing. Depending on the orders which may be passed on the review application, further steps may be taken in the matter of hearing the stay applications and the appeals. Since coercive recovery as per the impugned communications dated 16.2.2004 and 27.3.2004 (Annexures "K" and "L" respectively) is being made by respondent No.3 on the ground that the petitioner's appeals were dismissed on 14.2.2000 (Annexure "C") and since the said order is set aside, the respondents shall not make any recovery of any amount payable under the order dated 19.2.1999 (Annexure "A") during pendency of the aforesaid proceedings before the Commissioner (Appeals).

Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

sundar/-